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(21)

IN THE

Supreme Court of the United States

FRIENDS OF THE EARTH, *et al.*,

Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF HERCULES INCORPORATED IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Amicus curiae, Hercules Incorporated ("Hercules"), is currently a defendant in a case pending in the United States District Court for the District of New Jersey that has been described as "indistinguishable" from the case before this Court. The background of Hercules' case is discussed in *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.,* 50 F.3d 1239 (3d Cir. 1995), and *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.,* 830 F. Supp. 1525 (D.N.J. 1993). The Hercules case was tried before the Honorable Jerome B. Simandle beginning in February 1997. While the trial court's decision was pending, the decisions in *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 118 S. Ct. 1003 (1998), and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 149 F.3d 303 (4th Cir. 1998), *cert. granted,* 119 S. Ct. 1111 (March 1, 1999) (No. 98-822), were rendered. Hercules filed a motion to dismiss based on these decisions which was briefed and then argued in February 1999. On March 31, 1999, the trial court issued an Order for Administrative Termination of the case pending the decision in this appeal. The trial court noted "that the factual and procedural circumstances relating to redressability [in the Hercules] case are indistinguishable from . . . *Laidlaw* . . ." and further stated "because the Supreme Court will soon be determining whether the finding of mootness in *Laidlaw* was correct, it appears that the wisest course is to defer ruling upon this complex issue, or reaching the merits of this case, until the Supreme Court speaks in *Laidlaw* . . . ." Order for Administrative Termination at 1-2 (footnote omitted) (Herc. App.

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1. Counsel for the parties have consented to the filing of this *amicus* brief, and the letters of consent are being filed with this Court. No counsel for a party in this case authored this brief in whole or in part, other than *amicus* or its counsel, and no person or entity, other than *amicus* or its counsel, made a monetary contribution to this brief's preparation or submission, pursuant to Supreme Court Rule 37.

1-2a).[2] Consequently, Hercules has a direct interest in the outcome of the Laidlaw appeal.

SUMMARY OF ARGUMENT

The Fourth Circuit Court of Appeals' decision in *Laidlaw* correctly decided that the disposition of this case is controlled by *Steel Co.* Accordingly, the *Laidlaw* decision should be affirmed. *Steel Co.* ruled that constitutional standing does not exist where effectively the only relief sought by a citizen plaintiff is civil penalties payable to the United States Treasury. This is precisely the situation that exists here since the Petitioners' request for an injunction was denied. It is of no moment that when their complaint was filed, the Petitioners satisfied the "alleged to be in violation" statutory jurisdictional requirement discussed in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). It is well settled that post-complaint events can moot a case. Citizen suits are not exempt from the body of case law that demands that a plaintiff meet all the elements of constitutional standing at all stages of a lawsuit. If standing requirements are not met because of post-complaint events, then the case must be dismissed.

The *Gwaltney* decision anticipated a fact scenario identical to *Laidlaw* and discussed that, when presented with those circumstances, the case should be dismissed. The mootness discussion in *Gwaltney* would not have been included as part of the Court's opinion unless this Court recognized that post-complaint events could moot a citizen suit under the Clean Water Act. The fact that this Court remanded *Gwaltney* to the Fourth Circuit is irrelevant to the issues now before this Court. The Supreme Court could not decide the constitutional standing question because the lower court never developed the necessary factual record.

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2. The complaint against Hercules was filed on May 24, 1989, the last permit violation occurred on August 9, 1990, the trial court denied the plaintiffs' request for injunctive relief on March 31, 1993, and the trial court entered summary judgment for Hercules on the plaintiffs' injunction claim on July 28, 1993. *See PIRG v. Hercules, supra,* and Herc. App. 4-5a.

Moreover, the Fourth Circuit properly dismissed the Petitioners' claims because a citizen cannot obtain civil penalties after its injunctive relief claim is denied. The connection between civil penalties and injunctions in citizen suits is evidenced by the language of the Clean Water Act and this Court's *Gwaltney* opinion. The dismissal of Petitioners' case, after their injunction claim was denied, is consistent with the supplementary enforcement role envisioned for citizen plaintiffs. In the absence of a necessity to compel permit compliance, citizen plaintiffs play no effective role, and any relief they request will not "redress" their alleged injuries. The litany of horrors that Petitioners predict will occur if the dismissal of their complaint is affirmed will not occur and, in any event, do not usurp constitutional standing requirements and limits put on citizen suits in the Clean Water Act. Trial courts are well-equipped to avoid and deter intentional delaying tactics and can certainly recognize, address, and cure insincere attempts at permit compliance.

Lastly, Petitioners' request for declaratory relief does not provide them with the requisite redressability. As set out in *Steel Co.*, a declaration of liability as to a past violation is worthless. A request for useless relief cannot bootstrap a citizen plaintiff back into court when its request for injunctive relief is denied.

ARGUMENT

I. PETITIONERS' CASE MUST BE DISMISSED AS MOOT BECAUSE THE ONLY RELIEF THEY COULD BE AWARDED IS CIVIL PENALTIES PAYABLE TO THE UNITED STATES TREASURY.

A. The *Steel Co.* Decision Controls the Disposition of This Case.

1. All elements of constitutional standing must be met at all stages of a lawsuit.

This Court's decision in *Steel Co.* examined the same constitutional issue presented in this appeal and controls the disposition of the case. Constitutional standing requires a

plaintiff to sue over justiciable disputes and must be present at every stage of a lawsuit.[3] If constitutional standing is established, then plaintiffs seeking recourse under a specific statute are also required to prove the standing elements set forth in the statute. The Fourth Circuit recognized this distinction and properly dismissed the Petitioners' case based on post-complaint events that deprived the court of constitutional jurisdiction, even though when the complaint was filed the Petitioners satisfied the *Gwaltney* "to be in violation" requirement. Any other ruling would conflict with *Steel Co.* and decades of case law analyzing subject matter jurisdiction.

Article III, §2 of the Constitution limits the "judicial Power" of the United States to cases where a plaintiff has "standing" to sue. *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559-60 (1992). This "irreducible constitutional minimum of standing" contains three elements: (1) the plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the plaintiff's alleged injury and the complained-of conduct; and (3) there must also be "redressability," defined as a likelihood that the requested relief will redress the alleged injury. *Steel Co.,* 118 S. Ct. at 1017; *Lujan,* 504 U.S. at 560; *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 41-42 (1976); *Warth v. Seldin,* 422 U.S. 490, 505 (1975).

Further, standing is not a remote or stale concept to be evaluated once, and thereafter forgotten. Standing must be met at the time the complaint is filed and throughout the course of the case, at least through trial. *Arizonans for Official English v. Arizona,* 520 U.S. 43, 117 S. Ct. 1055, 1068 (1997). As the Fourth Circuit recognized below, this Court, in *United States Parole Commission v. Geraghty,* 445 U.S. 388, 397 (1980), explained mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must

3. Statutory standing examines whether a plaintiff has a cause of action under the specific law being sued upon, *i.e.,* is the plaintiff within that statute's "zone of interests." *Steel Co.,* 118 S. Ct. at 1013 (citing *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers,* 414 U.S. 453, 465 (1974)). Constitutional standing, on the other hand, examines if there is a case or controversy under Article III of the Constitution. *Id.* at 1013.

exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Accord Church of Scientology of Cal. v. United States,* 506 U.S. 9, 12 (1992).

It is the third prong of the standing test, redressability, which is at issue in this appeal. The *Steel Co.* decision squarely addressed the redressability issue and ruled that this requirement is not satisfied when civil penalties and attorney's fees are effectively the only forms of relief a plaintiff is seeking. Since Petitioners' other potential forms of redressable relief became moot during the pendency of the litigation, *Steel Co.* demands that Petitioners' case be dismissed.

2. The *Steel Co.* decision held that civil penalties alone are not sufficient to satisfy the redressability element of standing.

In *Steel Co.,* this Court reversed the Seventh Circuit's decision, which had allowed a citizen group to sue for past failures to report its toxic chemicals inventory, based upon the citizen suit provision of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046 ("EPCRA"). In ruling that those citizen-plaintiffs did not have standing, this Court reached an important and significant conclusion for citizen suit plaintiffs: if the only effective relief that may be awarded is civil penalties and attorney's fees, Article III jurisdiction is lacking.

Steel Co. could not be clearer that civil penalties, such as those requested by Petitioners here, do not support redressability under Article III:

> [T]he civil penalties authorized by the statute [EPCRA] might be viewed as a sort of compensation or redress to respondent if they were payable to respondent. But they are not. These penalties – the only damages authorized by EPCRA – are payable to the United States Treasury. . . . By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Trea-

> sury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury. . . . Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.

118 S. Ct. at 1018-19 (citations omitted) (emphasis in original).

Similarly, *Steel Co.* held that a request for attorney's fees, such as demanded by Petitioners here, does not create standing:

> Obviously . . . a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself. An "interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim."

118 S. Ct. at 1019 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) (citing *Diamond v. Charles*, 476 U.S. 54, 70-71 (1986))). *Steel Co.* then proceeded to dismiss the plaintiff's action because the other forms of relief requested, declaratory and injunctive, were not available to the plaintiff. Simply put, *Steel Co.* plainly established that if the relief requested by a citizen plaintiff does not redress its alleged injuries, in that case civil penalties and attorney's fees, the case must be dismissed.

The *Steel Co.* decision is controlling. Just as in *Steel Co.*, the Fourth Circuit in *Laidlaw* examined the relief sought and found that no standing existed because the following were lacking at the time of trial: (1) a continuing violation, (2) an imminent threat of a violation, and (3) damages suffered by plaintiff, beyond solely litigation costs and a request for civil penalties (*i.e.*, some other "costs" recoverable by statute). *See Steel Co.*, 118 S. Ct. at 1018-20. Because Petitioners are merely presenting claims for civil penalties and attorney's fees, *Steel Co.* mandates that the case be dismissed. The fact that Petitioners may have had redressable claims when they filed their complaint does not remove the requirement that standing be maintained during all stages of a case.

3. The fact that the plaintiff in *Steel Co.* did not allege an ongoing violation in its complaint is not legally significant to the disposition of this appeal.

Petitioners argue that *Steel Co.* is limited to selected citizen suits where no allegation of an ongoing violation is made at the time a complaint is filed. (Pet'r Br. at 19-21.) Yet, a comparison of the facts in *Steel Co.* to those in this case reveals no legally significant distinctions. The logic and reasoning of *Steel Co.*, when combined with the traditional and longstanding doctrine of mootness, dictate that the Fourth Circuit's decision be affirmed.

The essence of the *Steel Co.* holding is straightforward – civil penalties and attorney's fees, in and of themselves, do not supply the necessary redressability to support Article III standing to sue. Moreover, mootness, as noted above, is "standing set in a time frame." *Geraghty*, 445 U.S. at 397. Thus, each of standing's three elements must exist at every stage of a case. *Arizonans for Official English*, 117 S. Ct. at 1068. When these principles are examined in the context of the *Steel Co.* decision, an inescapable conclusion is reached. If at some point in a case a citizen plaintiff loses its redressability, that plaintiff has lost its standing to maintain the litigation, and the entire dispute, including any right to civil penalties or attorney's fees, has become moot.

The fact that Petitioners had redressable injuries at the commencement of the case, whereas the *Steel Co.* plaintiff did not, is not legally significant. Just as subsequent events that change a plaintiff's injury-in-fact can moot a case, subsequent events which oust a plaintiff of redressable claims can also moot a case. There is no logical rationale or case support offered by Petitioners to support their argument that redressability, unlike the other two prongs of standing, need only be met at the time a complaint is filed.

Petitioners attempt to distinguish *Steel Co.* by arguing that "the determining factor in *Steel Co.* was the plaintiff's inability to make and prove an allegation of continuing violation at the time of the complaint." (Pet'r Br. at 20.) Yet, the exact language cited by Petitioners for that proposition actually supports an opposite holding:

> *If respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm.* But there is no such allegation here – and on the facts of the case, there seems no basis for it.

(Pet'r Br. at 19-20) (quoting *Steel Co.*, 118 S. Ct. at 1019) (emphasis in original). Contrary to Petitioners' interpretation, when this Court referred to the absence of an allegation of an ongoing violation, it was merely explaining why injunctive relief was not available under the facts of the case before it. Nothing in this Court's language suggests that the doctrine of mootness be eviscerated once a continuing violation is shown at the start of a case.[4]

Petitioners here sought injunctive relief in their complaint. Yet, mere allegations in complaints do not control constitutional requirements. Rather, mootness requires an examination of the requested relief at every stage of a case. Here, because of post-complaint events, there is no longer a viable claim for injunctive relief. The only remaining items of substantive relief requested are for civil penalties and attorney's fees, which *Steel Co.* clearly and directly decided are not sufficient to satisfy Article III standing.

The factual differences between *Steel Co.* and this case only had significance prior to the time that Petitioners' claims became moot. In other words, Petitioners' injuries were redressable, and thus still "live" for mootness purposes, during

4. Moreover, this argument ignores the procedural history of *Steel Co.*, where this Court faced the standing issue at the motion to dismiss stage, not following trial as occurred here. *See Steel Co.*, 118 S. Ct. at 1017. Obviously, this Court in *Steel Co.* had no reason to examine post-complaint events because standing was lacking when the complaint was filed.

the time when injunctive relief was available. However, after their request for an injunction was denied, Petitioners lost their standing to maintain this litigation. Any other ruling would be in direct conflict with *Steel Co.*

4. Future deterrence of potential Clean Water Act violations does not satisfy the redressability element of standing.

Petitioners attempt an "end run" around *Steel Co.*, and thereby avoid Article-III based redressability requirements, by citing to the deterrent effect of civil penalties imposed on violators of the Clean Water Act, 33 U.S.C. § 1251, *et seq.* (Pet'r Br. at 24-29.) Yet, no matter how often Petitioners cite to deterrence, they cannot overcome the unqualified conclusion of *Steel Co.* that in the absence of a valid injunctive relief claim deterrence alone does not satisfy the redressability prong of constitutional standing. Moreover, whatever Congress' intent may have been in allowing for civil penalties, Article III jurisdiction must still be proven before penalties can be awarded.

Steel Co. faced the same argument raised by Petitioners here, that deterrence is enough to satisfy redressability, and rejected it outright. After noting that civil penalties are payable to the United States Treasury, and not to the plaintiffs, the Court held:

> In requesting [civil penalties], respondent seeks not remediation of its own injury – reimbursement for the costs it incurred as a result of the late filing – but vindication of the rule of law – the "undifferentiated public interest" in the faithful execution of EPCRA. . . . This does not suffice. Justice Stevens [in His concurring opinion] thinks it is enough that respondent will be gratified by seeing petitioner punished for its infractions and that *the punishment will deter the risk of future harm.* . . . If that were so, our holdings in *Linda R. S. v. Richard D.*, 410 U.S. 614 . . . (1973), and *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 . . . (1976), are

> inexplicable. Obviously, such a principle would make the redressability requirement vanish.

118 S. Ct. at 1018 (emphasis added) (internal citations omitted). This Court's clear language could not make this principle more settled and established.

In addition, *Steel Co.* makes no differentiation or distinction, as Petitioners argue, based upon when the allegations of ongoing violations are made. (Pet'r Br. at 21.) To the contrary, this Court in *Steel Co.* emphasized that remedies which do not flow to the citizen plaintiff cannot provide the requisite redressability. *See Steel Co.*, 118 S. Ct. at 1019 (the fact that a "wrongdoer gets his just deserts," or that a plaintiff receives "psychic satisfaction" from a result, "is not an acceptable Article III remedy"). Accordingly, even accepting Petitioners' alleged "common sense" proposition that civil penalties deter potential water polluters, (*see* Pet'r Br. at 28), this does not override the absence of an acceptable Article III injury. Despite Petitioners' protestations to the contrary, a generalized interest in deterrence does not act as a substitute for a concrete, redressable Article III injury.

B. *Gwaltney* Contemplated a Case Such as This That Could Be Mooted Even Where the Requirements of Statutory Jurisdiction Were Met When the Case Was Filed.

The *Laidlaw* decision is in complete accord with *Gwaltney* and is not, as Petitioners argue, in "direct conflict." (Pet'r Br. at 9.) *Gwaltney* plainly indicates that post-complaint events can moot a citizen suit. Indeed, *Gwaltney* anticipated the fact scenario presented in this appeal and discussed how "[l]ongstanding principles of mootness ... prevent the maintenance of suit when there is no reasonable expectation that the wrong will be repeated." 484 U.S. at 66 (internal quotation marks omitted).

Although *Gwaltney* primarily addressed the "to be in violation" language of §505(a) of the Clean Water Act, 33 U.S.C.

§ 1365(a),[5] it also had occasion to discuss what happens if the "allegations of ongoing noncompliance become false *at some later point* in the litigation because the defendant begins to comply with the Act, ..." *Id.* (emphasis added). When it answered this question, this Court stated that the mootness doctrine "protects defendants from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing, ..." *Id.* at 66-67. It is evident from this language that this Court anticipated that post-complaint events could moot a citizen's claim against a defendant, even though the defendant was "in violation" of its permit at the time the complaint was filed. Unless this were true, this Court would not have referred to "some later point in the litigation" in its mootness discussion. *Id.* at 66. The "point" of reference referred to by this Court was the date the complaint was filed. The "later point" could only have referred to post-complaint events.

Moreover, the *Gwaltney* decision stated that the mootness doctrine "protects defendants from the *maintenance* of suit." *Id.* at 66-67 (emphasis added). This evidences that the *Gwaltney* Court intended that post-complaint events could moot a case. "To maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun." *Smallwood v. Gallardo*, 275 U.S. 56, 61 (1927); *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 377 (1933). When this Court indicated that defendants would be "protected" from the "maintenance" of suit, the Court acknowledged that a citizen suit should be dis-

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5. Section 505(a), as codified, 33 U.S.C. § 1365(a), provides in pertinent part:

> Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf –
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, ...

missed as moot even though the complaint satisfied jurisdictional requirements when filed.

C. The *Laidlaw* Ruling Furthers the Supplemental Role Envisioned for Citizens in Enforcement Litigation.

Petitioners argue that if violations or the risk of violations exist at the time a complaint is filed, a case can never become moot.[6] The fact that the Petitioners are wrong is demonstrated by the mootness discussion in *Gwaltney*. Moreover, Petitioners ignore the role envisioned for citizen plaintiffs in enforcement litigation, and how the outcome in *Laidlaw* is completely consistent with this role.

Gwaltney discussed the role citizens serve in enforcement litigation and focused on the abatement of pollution when the government cannot or will not command compliance. 484 U.S. at 61. If a defendant such as Laidlaw is not violating its permit, such that no injunction is necessary to compel compliance, there is no longer a role for the citizen plaintiff to play. Thus, the continuation of a suit, once it is clear compliance has been achieved, is not necessary. Simply put, the "supplementary role envisioned for this citizen suit," *id.* at 60, will have been satisfied once compliance is achieved. The dismissal of cases that become moot based on post-complaint events strikes "a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom v. Tillamook County,* 493 U.S. 20, 29 (1989), *reh'g denied,* 493 U.S. 1037 (1990).

Petitioners also ignore the fact there is a recognized connection between a citizen's request for civil penalties and

6. Petitioners' Brief states:

> *Steel Co.* indicates that a citizen plaintiff has standing throughout a case regardless of whether the violations cease as long as the violations were continuing at the time of the complaint or at least that there was a risk that such violations were continuing at the time of the complaint.

(Pet'r Br. at 19.)

injunctive relief, such that a citizen cannot obtain civil penalties in the absence of an injunction.[7] In *Gwaltney*, this Court stated:

> In contrast, §505 of the Act does not authorize civil penalties separately from injunctive relief; rather, the two forms of relief are referred to in the same subsection, even in the same sentence. 33 U.S.C. §1365(a). The citizen suit provision suggests a connection between injunctive relief and civil penalties that is noticeably absent from the provision authorizing agency enforcement. *A comparison of §309 and §505 thus supports rather than refutes our conclusion that citizens, unlike the Administrator, may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation.*

484 U.S. at 58-59 (emphasis added).[8] Furthermore, in discussing the legislative history of the Clean Water Act, this Court referred to the fact that "[m]embers of Congress frequently characterized the citizen suit provisions as 'abatement' provi-

7. Petitioners argue:

> This Court's holding on the statutory jurisdictional issue in *Gwaltney* further shows that injunctive relief is not a *sine qua non* to civil penalty relief in a citizen suit. This Court held that "citizens *** may seek civil penalties only in a suit brought to *enjoin or otherwise abate an ongoing violation*" (emphasis added). 484 U.S. at 59. The emphasized language, which is stated in the disjunctive, shows that civil penalties are available in a citizen suit when injunctive relief is not.

(Pet'r Br. at 16) (emphasis in original).

8. The use of the term "enjoin or otherwise abate" in the middle of this Court's discussion that "§505 of the Act does not authorize civil penalties separately from injunctive relief," 484 U.S. at 58, does not support Petitioners' argument that "civil penalties are available in a citizen suit when injunctive relief is not." (Pet'r Br. at 16.) This Court plainly was referring to an injunction either to stop an operation or to bring it into permit compliance. Enjoin is defined as "To require; command; positively direct. To require a person, by writ of injunction, to perform, or to abstain or desist from, some act." *Black's Law Dictionary* 529 (6th ed. 1990). Abate is defined as "To bring down entirely or demolish, to put an end to, to do away with, to nullify, to make void." *Id.* at 4.

sions or as injunctive measures." *Id.* at 61. In addition, this Court stated, "[m]oreover, both the Senate and House Reports explicitly connected §505 to the citizen suit provisions authorized by the Clean Air Act, which are wholly injunctive in nature." *Id.* at 62. This discussion evidences the plain connection between injunctive relief and civil penalties. Legislative history and prior precedent support the *Laidlaw* holding that a citizen cannot obtain civil penalties unless injunctive relief is awarded.

If *Laidlaw* is affirmed, there is no legitimate risk that the parade of horribles Petitioners predict will occur will in fact take place.[9] Moreover, Petitioners grossly overstate the impact if *Laidlaw* is affirmed.[10] Trial courts are well equipped to recognize, handle, and sanction dilatory practices. Furthermore, it will be the exception rather than the rule that cases will be dismissed as moot. *Gwaltney* plainly noted that a defendant's burden to demonstrate mootness "is a heavy one." *Id.* at 66 (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)). In addition, the "general rule" is that voluntary cessation of illegal conduct does not make a case moot. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Courts are well aware of their duty "to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *W. T. Grant Co.*, 345 U.S. at 632

9. Petitioners argue:

> Moreover, the wasting of time and resources could become a vicious circle if a case were easily dismissed due to the voluntary cessation of the illegal conduct. In such circumstances, defendants would be free to resume illegal conduct, cease such conduct during suit to avoid the consequences of the suit, resume the illegal conduct when the case was dismissed as moot, and so on.

(Pet'r Br. at 23.) Petitioners also argue, "The court of appeals' decision eviscerates the citizen suit provision of the Water Act and creates perverse incentives that encourage violation of the Act and dilatory litigation practices." (Pet'r Br. at 36.)

10. Petitioners argue that *Laidlaw* "requires ... the dismissal of any citizen suit brought against a party that has violated a federal environmental law as long as that party comes into compliance prior to final judgment." (Pet'r Br. at 10.)

(quoting *United States v. Oregon State Med. Soc'y*, 344 U.S. 326, 333 (1952)). Ample authority exists to protect a citizen plaintiff from the "suddenly repentant defendant." *See Gwaltney*, 484 U.S. at 66-67.[11]

The same public policy arguments Petitioners make here can be raised in any case when a defendant asserts a mootness defense based on post-complaint events. Nevertheless, if the mootness standard is met, courts have dismissed cases based on a defendant's cessation of illegal activities and the prediction that the illegal conduct will not continue. *See Preiser v. Newkirk*, 422 U.S. 395 (1975). *See also Sperry v. Florida*, 373 U.S. 379, 383 n.1 (1963) (petitioner's right to refer to himself as a "Patent Attorney" mooted by his voluntary discontinuance of use of that term); *Davis, supra.* These cases recognize that "jurisdiction, properly acquired, may abate if the case becomes moot ...." *Id.* at 631. This, of course, is consistent with the rule in federal cases "that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser v. Newkirk*, 422 U.S. at 401 (citations omitted).

D. *Gwaltney* Does Not Support Petitioners.

Petitioners argue that *Gwaltney* is binding precedent based on certain factual similarities between the two cases. However, this Court in *Gwaltney* decided only statutory issues, not the constitutional jurisdiction issue presented in this case and in *Steel Co.* Further, the procedural and factual history of *Gwaltney* before this Court in 1987 were such that this Court had no basis upon which to dismiss the case as moot. Thus, the Petitioners' reliance on *Gwaltney* is misplaced.

Petitioners argue that *Gwaltney* controls by citing to the doctrine, verified in *Steel Co.*, that constitutional jurisdiction should be dealt with by a court first, before addressing the

11. Nonetheless, the burden to establish mootness is not insurmountable. "[S]peculative contingencies afford no basis for ... passing on the substantive issues [the petitioner] would have us decide ... in the absence of evidence that this is a prospect of immediacy and reality." *DeFunis v. Odegaard*, 416 U.S. 312, 320 n.5 (1985) (quoting *Hall v. Beals*, 396 U.S. 45, 49 (1969)) (internal quotes omitted).

merits of a case. (Pet'r Br. at 15.) It follows, according to Petitioners, that this Court in *Gwaltney* "necessarily decided that this case was not moot even though injunctive relief was no longer viable." (Pet'r Br. at 16.) This argument fails on several levels.

First, this Court expressly noted in *Steel Co.* that *Gwaltney* did not decide the issue of constitutional standing:

> The short of the matter is that the jurisdictional character of the elements of the cause of action in *Gwaltney* made no substantive difference (nor even any procedural difference that the Court seemed aware of), had been assumed by the parties, and was assumed without discussion by the Court. We have often said that *drive-by jurisdictional rulings of this sort (if Gwaltney can even be called a ruling on the point rather than a dictum) have no precedential effect.*

118 S. Ct. at 1011 (emphasis added).[12] Justice Stevens' concurring opinion in *Steel Co.* likewise confirms that *Gwaltney* "resolved the statutory question without pausing to consider whether the plaintiffs had standing to sue for wholly-past violations." *Id.* at 1025. Justice Stevens also stated, "the fact that we did not discuss standing in *Gwaltney* does not establish that the plaintiffs had standing there." *Id.* And, Justice Stevens pointed out "the omission of even a passing reference to any standing issue in connection with the principal holding [in *Gwaltney*]." *Id.* at 1025 n.13. As summarized succinctly by Justice Scalia, the Article III requirement of remedial injury in fact, which was addressed in *Steel Co.*, has "nothing to do with the text of the statute [Clean Water Act] relied upon" that was addressed in *Gwaltney*. *Id.* at 1014 n.2.

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12. This Court in *Steel Co.* was clearly aware of the distinction between satisfying *Gwaltney*'s statutory requirements and Article III constitutional requirements by noting that there was a "fundamental distinction between arguing no cause of action and arguing no Article III redressability . . . ." 118 S. Ct. at 1013. This Court further noted that the issue of "statutory standing . . . has nothing to do with whether there is case or controversy under Article III." *Id.*

Second, given that *Gwaltney*'s treatment of constitutional jurisdiction was, at best, a "drive-by" ruling entitled to no more weight than dicta, basic principles of jurisprudence compel that *Gwaltney* is not precedent for the constitutional issue to be decided here. It is firmly established that reasoning or language found to be dicta is not binding on courts obligated to follow that court's precedent. *See Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 399-400, 5 L. Ed. 257 (1821); *Brecht v. Abrahamson,* 507 U.S. 619, 631 (1993) (citing *Edelman v. Jordan,* 415 U.S. 651, 670-71 (1974)).

Petitioners also argue that since mootness was raised in the 1987 *Gwaltney* briefs filed with this Court, *Gwaltney* is controlling by implication. (Pet'r Br. at 14.) However, Petitioners apparently concede, as they must, that *Gwaltney* never ruled on this precise issue, since they state that this issue was "necessarily determined" by the remand to the Fourth Circuit. (Pet'r Br. at 16.) This attempt to establish silent, but implicit, precedent has been flatly rejected by this Court. "Questions which merely murk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall,* 266 U.S. 507, 511 (1925). *Accord Hagans v. Lavine,* 415 U.S. 528, 533 n.5 (1974) ("when questions of jurisdiction have been passed on in prior decisions *sub silentio,* this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issues before us"); *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 119 (1984); *United States v. L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 38 (1952). Accordingly, unstated assumptions or rulings, which were either ignored or not raised before a court, do not become precedential holdings for future cases. *Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 182-83 (1979).

Lastly, Petitioners' argument that *Gwaltney* controls is based on the faulty premise that this case is factually and procedurally identical to *Gwaltney*. An examination of the history of *Gwaltney*, particularly from the District Court and Fourth

Circuit decisions that preceded this Court's 1987 opinion, reveals instead that this case and *Gwaltney* are distinguishable for a number of reasons.

The plaintiffs in *Gwaltney* originally filed their District Court complaint in June 1984, only one month after the last reported violation. *Gwaltney*, 611 F. Supp. 1542, 1544-45 (E.D. Va. 1985). In August 1984, those plaintiffs received a summary judgment ruling which declared, under a standard that this Court later overturned, the defendant "to have violated and to be in violation of" the Clean Water Act. *Gwaltney*, 484 U.S. at 54. Only a few months later, in December 1984, the District Court held a hearing as to the amount of civil penalties to be assessed. *Gwaltney*, 611 F. Supp. at 1549 n.8.

As part of its ruling, the District Court cited to testimony of a defense witness from the December 1984 hearing, who stated that he would not be confident that the violation would not recur until several months *after* the hearing, when the manufacturing plant would have undergone a full winter's operation. *Id.* The Fourth Circuit on the initial appeal recognized this factual finding, but gave it no weight, as it:

> assume[d] ... Gwaltney had ceased violating the limits of its NPDES permit ... [b]ecause we hold that the Clean Water Act confers on the district court jurisdiction over citizen suits seeking civil penalties for past violations.... [W]e need not decide whether plaintiffs in this case made their allegations of continuing violations in good faith.

Gwaltney, 791 F.2d 304, 308 n.9 (4th Cir. 1986).

The District Court's rationale for its denial of an injunction in *Gwaltney* is also significant. Petitioners argue, "the defendant's violations ceased a month before the complaint was filed.... *As a result*, no injunctive relief was awarded by the district court." (Pet'r Br. at 14) (emphasis added). However, the footnote cited by Petitioners, which was from the Fourth Circuit *after* this Court remanded the case in 1987, shows the District Court gave no justification for its denial of injunctive relief:

> The district court did not grant the injunction, *nor did its opinion give a rationale for not doing so.* However, in a later proceeding, Judge Merhige explained that he was reluctant to enjoin people to do what the law requires them to do.

Gwaltney, 890 F.2d 690, 692 n.2 (4th Cir. 1989) (emphasis added). In contrast, the District Court here expressly held that an injunction should not issue because the violations were not substantially likely to recur.

Further, the scenario this Court faced in *Gwaltney* was markedly different from the case at hand. The lower court decision appealed in *Gwaltney* had no reason to examine whether post-complaint events mooted the case. This was because the District Court and the Fourth Circuit in *Gwaltney* permitted citizen suits for wholly-past violations. Thus, those courts did not reach any factual findings as to mootness, such that the record below was insufficient for the *Gwaltney* Court to determine whether the case was moot.

This Court in *Gwaltney* could not have dismissed the case as moot because evidence on the issue was not developed below. Insufficient facts were developed below as to whether the case had become moot, unlike the situation here where the lower court expressly found that Petitioners did not meet the elements for injunctive relief against Laidlaw. Also, in 1987 this Court did not have before it an explanation from the court below as to why an injunction was denied. Lastly, no undisputed fact showing that the case was moot was present before this Court in *Gwaltney*, but is present here, *i.e.*, the closure of Laidlaw's plant. These factual and procedural distinctions demonstrate why *Gwaltney* is not controlling on the issues before this Court.

In remanding the case, this Court in *Gwaltney* gave directions to the Fourth Circuit on two issues. First, the Court expressly rejected the notion that citizens could sue for wholly past violations, and remanded for further proceedings on that issue. Additionally, this Court included a discussion on mootness, presumably not to be ignored but to identify an issue to address on remand. Not unexpectedly, the defendant raised

mootness after remand. The Fourth Circuit on remand would not have decided the mootness issue, 890 F.2d at 696, if this Court had decided, as Petitioners argue, that after *Gwaltney*'s statutory requirements are met, a case cannot become moot.[13]

II. NONE OF THE DECLARATORY RELIEF PETITIONERS REQUEST REDRESSES ANY ALLEGED INJURY.

Petitioners also argue that this case is "live" because they seek declaratory relief as to now-past violations. This argument has no merit under the redressability analysis of *Steel Co.* and should be dispensed in short order. Petitioners attempt to distinguish *Steel Co.* by arguing that a declaratory judgment as to *Laidlaw*'s now nearly decade-old permit exceedances is of some utility because *Laidlaw* contests them. (Pet'r Br. at 39-40.) However, Petitioners offer no explanation as to how such a declaratory judgment against Laidlaw, for post-complaint but now mooted violations, is different from the declaratory judgment denied in *Steel Co.* for pre-complaint violations. At the time of trial, the Petitioners here sought a declaratory judgment for wholly-past violations. As previously discussed in detail, the mere fact that such claims were never pled in *Steel Co.* is no reason to distinguish them from these claims, which have become moot.

Petitioners' analysis, if adopted, would lead to the absurd result that a defendant could avoid liability by stipulating to liability. If a Clean Water Act defendant does not believe it committed a violation, but also believes any alleged violation has been mooted due to the passage of time, that defendant would be encouraged to admit liability for the prior violations in order to eliminate redressability.

Just as in *Steel Co.*, a declaratory judgment that Laidlaw violated the Clean Water Act nearly ten years ago "is not only worthless to [petitioners], it is seemingly worthless to all the world." *Steel Co.*, 118 S. Ct. at 1018 (citing *Lewis v. Continental Bank Corp.*, 494 U.S. at 479). Such a declaration for past

13. The Fourth Circuit's 1989 *Gwaltney* decision was not appealed to this Court.

infractions is exactly the sort of "psychic satisfaction" which is insufficient to establish redressability. *Id.* at 1019. The only arguable redress for Petitioners relates to their "generalized interest in deterrence, which is insufficient for purposes of Article III." *Id.* Accordingly, Petitioners' claim for civil penalties cannot resuscitate what are otherwise non-redressable claims. Thus, the Fourth Circuit's decision properly dismissed this case as moot, and should be affirmed.

CONCLUSION

For all the reasons discussed herein, *amicus curiae*, Hercules Incorporated, respectfully requests that this Court affirm the Fourth Circuit's decision on the merits.

Respectfully submitted,

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July 19, 1999

APPENDIX OF *AMICUS CURIAE* HERCULES INCORPORATED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., et al.,	:	Civil No. 89-2291 (JBS)
	:	Civil No. 93-2381 (JBS)
Plaintiffs,	:	
v.	:	ORDER FOR ADMINISTRATION
HERCULES, INC.,	:	TERMINATION
Defendant.	:	

This matter came before the court upon motion of defendant Hercules, Inc., to dismiss this case for lack of standing due to alleged absence of redressability, upon which this court heard oral argument on February 5, 1999; and

The court finding that the factual and procedural circumstances relating to redressability of the present case are indistinguishable from *Friends of the Earth, Inc. v. Laidlaw Services, Inc.*, 149 F.3d 303 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1111 (March 1, 1999), which held that, in a Clean Water Act suit seeking civil penalties and costs after injunctive relief has been denied, in which there is no probable likelihood of a repetition of events of non-compliance, the complaint for civil penalties and costs was properly dismissed as moot despite plaintiffs' standing at the time the suit was filed; because the Supreme Court will soon be determining whether the finding of mootness in *Laidlaw* was correct,[1] it appears that the wisest

1. Specifically, the Supreme Court granted certiorari on the following three issues:

> (1) Is citizen suit seeking civil penalties under Section 505 of Clean Water Act constitutionally moot under *Steel Co. v. Citizens for Better Environment*, 66 U.S.L.W. 4174 (U.S. 1998), due to lack of redressability, when plaintiffs had standing at time of complaint and have shown continuing injury-in-fact but have

course is to defer ruling upon this complex issue, or reaching the merits of this case, until the Supreme Court speaks in *Laidlaw*; and

This court, by letter of March 10, 1999, sought the views of the parties to obtain their assent to temporarily suspending this case through an Order for Administrative Termination while awaiting the Supreme Court's decision in *Laidlaw*; counsel for defendant responded that Hercules has no objection (*see* Letter of Joel Schneider, Esquire, dated March 15, 1999), while counsel for plaintiffs responded that this case is distinguishable from *Laidlaw* and that, in any event, *Laidlaw* is not binding in the Third Circuit[2] (see Letters of Carolyn Smith Pravlik, Esquire, dated March 12, 1999 and March 22, 1999); while this court agrees that *Laidlaw* is not Third Circuit precedent, a decision of the United States Supreme Court upon this issue will be binding, and it is more than worth waiting for; this court neither adopts nor rejects the Fourth Circuit's

not obtained injunctive relief? (2) Is citizen suit seeking civil penalties under Section 505 of Clean Water Act constitutionally moot under *Steel Co.*, due to lack of redressability, when district court has rendered declaratory judgment as to liability and issue of liability was contested? (3) Could plaintiffs not be awarded attorneys' fees or litigation costs because case was dismissed for mootness, even if litigation was responsible for bringing defendant into compliance with Clean Water Act?

67 U.S.L.W. 3537.

2. At oral argument on February 5, 1999, however, plaintiffs' counsel acknowledged that *Laidlaw*, though decided incorrectly by the Fourth Circuit in her view, presented circumstances indistinguishable from the present case:

> THE COURT: Is *Laidlaw* distinguishable from the present case: And I know you've argued it was wrongly decided, and of course–
>
> MS. PRAVLIK: In–
>
> THE COURT: But if it was correctly decided, is there any way to distinguish it?
>
> MS. PRAVLIK: No. I mean, obviously, it has, you know, different facts and whatever, but in terms of the relevant facts to this issue, no. It's indistinguishable from this situation.

Transcript of Hearing (Feb. 5, 1999), at 33:17 to 34:1.

analysis in *Laidlaw*, and a temporary stay of proceedings herein will be imposed in the interest of judicial economy;

IT IS this 31st day of March, 1999, hereby

ORDERED that consideration of defendant's motion is stayed pending determination by the Supreme Court in *Laidlaw*; and

IT IS FURTHER ORDERED that the Clerk shall ADMINISTRATIVELY TERMINATE this matter upon his docket, without prejudice to any party's right to reopen the docket for further proceedings consistent with law;[3] and

IT IS FURTHER ORDERED that this Order for Administrative Termination does not operate as a dismissal or other determination of any claim, nor does this Order have any consequence for purposes of statute of limitations or other rights of any party.

/s/ Jerome B. Simandle
JEROME B. SIMANDLE
U.S. District Judge

3. When the Supreme Court renders its decision in *Laidlaw*, this docket must be reopened for further proceedings upon defendant's motion and upon the merits of the plaintiffs' claims consistent with *Laidlaw*.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., et al.,	:	Civil No. 89-2291 (JBS)
Plaintiffs,	:	
v.	:	
HERCULES, INC.,	:	HON. JEROME B. SIMANDLE
Defendant.	:	

STIPULATION AND ORDER

WHEREAS, on March 31, 1993, this Court ruled on plaintiffs' and 'efendant's cross-motions for summary judgment;

WHEREAS, the Court denied the cross-motions for summary judgment as to defendant's liability for six discharge violations which defendant claims were caused by an upset at defendant's facility resulting from the failure of a blower and a replacement blower (discharge violation nos. 50-51, 53, 56-58 in plaintiffs' September 14, 1992, letter to Judge Simandle);

WHEREAS, the Court granted defendant's motion for summary judgment that it is not liable for six discharge violations which were allegedly caused by an upset at defendant's facility resulting from electrical failures and heavy rains (discharge violation nos. 42-47 in plaintiff's September 14, 1992, letter to Judge Simandle);

WHEREAS, the Court denied plaintiffs' request for a permanent injunction;

WHEREAS, the parties desire to assure that the trial reduces the burden and costs on the parties and the Court by focusing on whether additional penalties may be imposed for

the violations already addressed by the New Jersey Department of Environmental Protection and Energy;

IT IS HEREBY AGREED AND STIPULATED BY THE PARTIES THAT:

1. Defendant consents to the entry of summary judgment on liability for discharge violation nos. 50-51, 53, 56-58 in plaintiffs' September 14, 1992, letter to Judge Simandle;

2. Plaintiff's agree to the dismissal with prejudice of discharge violation nos. 42-47 in plaintiffs' September 14, 1992, letter to Judge Simandle and not to seek to overturn that judgment in any court;

3. Summary judgment is entered for Hercules as to plaintiffs' claims for injunctive relief without prejudice to another application based upon future violations.

/s/Elisabeth J. Lyons
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EDWARD LLOYD
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The foregoing stipulation is hereby entered as an Order of the Court, this 28th day of July, 1993.

/s/Jerome B. Simandle
JEROME B. SIMANDLE
United States District Court Judge